No. Orig. 35

APR 9 1900
JAMES H. McKENNEY,
Clerk

Reply Brf. of Critz v Beckett,

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

Filed Apr. 9, 1900.

No. 244.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF OF F. A. CRITZ AND R. C. BECKETT IN REPLY TO BRIEF OF OPPOSITE COUNSEL ON THE MERITS.

F. A. CRITZ,
R. C. BECKETT,
Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-6-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

No. 244.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

Brief of F. A. Critz and R. C. Beckett in Reply to Brief of Opposite Counsel on the Merits.

In this brief, instead of reiterating points anticipated and already argued by us, we shall merely call attention to the pages in our various briefs where our answer appears. Unless otherwise noted, "our brief" will always refer to our big brief on the merits in this case, and the reference to pages of their argument is to their brief on the merits, lately filed.

1st. On pages 4 and 9 they speak of the *topography* of the country in Mississippi, the difficulty of building railroads, &c., but we suppose this court will take judicial notice of the fact that Mississippi is a level farming country, without a mountain or minerals in it, and an experienced railroad contractor who assisted in building this and other railroads, O. A. Gibson, shows that it was a very easy road to build.

Record, pp. 433–440.

2d. They speak on page 4 of the State being impoverished and applying to Congress to aid the Gulf and Ship Island railroad. In their opinion in this case, the Supreme Court show that there was great solicitude and anxiety to get that road built in order to build up a seaport for Mississippi.

Record, p. 674.

3d. They state on page 6 that the taxes of the *preceding* year were applied to the debts. We would not notice this but for the fact that the first suit here was for the taxes of 1892, and this statement might lead this court to infer that the consolidation did not apply, because the exemption was earned *in 1891*, the preceding year. The taxes of each year were not delinquent till December 15 of the same year, and they had till December 15, 1892, to make the appropriation, and, if the exemption was lost or repealed on October 25 and before the appropriation was made, there would be no authority to make it afterward. This section 21 is copied in their brief, on pages 7 and 8, and says the appropriation must be made *during the year*, not the preceding year.

Code 1892, section ~~3379~~ 3801

4th. That the legislature recognized the distinction between the exemption and appropriation forms (pp. 7, ~~11 43~~ 38-43). This is answered in our brief (pp. 87, 88).

Besides, the gentlemen must have short memories, as they show on page ~~15~~ 38 that the legislature of 1880 repealed the

useless requirement of "*an assessment*" under this twenty-first section, showing conclusively that the legislature knew there was no substantial difference.

5th. On page 9 they place the construction debt at $28,421,115. This included the cost of purchasing and also of building other roads not exempt. We show exactly and specifically what it cost to build the roads in controversy—that is, the main line, Riverside division, and Tallahatchie branch, excluding the parts in Louisiana and Tennessee. According to their own figures, it was only $9,101,563.01.

Our brief, pp. 53–56, 68, 69.

And it is not true that the whole business even cost $28,421,115. Maj. R. T. Wilson, the president of the road, says the cost was $26,339,101.29, *at 8 per cent. interest*, and $22,569,912.94, *at 6 per cent. interest*, computed up "to the time that we sold these securities" (Record, p. 305).

6th. They show on page 11 that the tax collectors, under section 3803 of the Code of 1892, could not receive affidavits, but could only receive in payment of taxes "United States Treasury notes and coins, national currency, and warrants drawn upon the State or county treasuries," thus themselves showing that the exemption had been repealed.

7th. They claim on pages 12, 13, and 24, 25 that there is a distinction between the suits for the taxes of 1896 and 1897 and those for the taxes of 1892–1895. We have noticed that in our brief on pages 25–27, and 99, 100.

8th. They still insist on pages 13, 22, 26, and 28 that the pleas were stricken out "as constituting no defense."

On this point see our brief, pp. 21–27, 33, 34, and 49, where we think we show this is not correct. For the full motion see our brief, pp. 12–15, and Record, pp. 606, 607.

They claim on page 28 that it is unfair for us to claim otherwise. We do not claim anything about it, but simply refer to the record to show that the order sustaining the motion to strike out was not limited to one ground, and the authorities to show that no one else has a right to so limit it.

Our brief, p. 23.

9th. They claim on pages 13 and 23 that the certificate of the Chief Justice shows jurisdiction. On this point see our brief, pp. 24, 102–104.

10th. They claim on pages 14 and 18–21 that this suit comes under the second class of section 709 of the Revised Statutes, where the Federal question need not be affirmatively raised. We answer that in our brief on pages 92–95 and 98, and also at length in our brief in case No. 318 here, on the motion to dismiss, on pages 30–37, where the revenue-agent act is copied in full.

11th. They claim on page 17 that the Keokuk case and in their brief on the motion to dismiss or affirm that the Y. & M. V. R. R. Co. *vs.* Thomas, 132 U. S., case are authority for this writ of error.

We answer that as in No. 10, *supra*. Besides in these cases the question was properly and directly raised in the original bills.

12th. They say on page 18 that the prevailing opinion in this case *studiously* avoided any reference to subsequent statutes. This we deny. They decided on the original invalidity of the twenty-first section, as this court admit they had a right to do in McCullough *vs.* Virginia, 172 U. S.,

122, and on the effect of the consolidation, and this court holds that a State court is not subject to criticism for declining to decide questions affecting the Constitution of the United States if they can find other questions to decide.

Baker *vs.* Grice, 169 U. S., 291, 292.

13th. On page 21 is a claim that a Federal question can be raised for the first time in a suggestion of errors. We answer this in our brief, pp. 96, 97.

14th. On page 22 they claim that they were entitled to raise the Federal question by new pleadings, although "it was already sufficiently raised." We deny this (our brief, pp. 33, 98, 99, 100).

15th. They claim on page 24 a statutory right to amend their pleadings. This is not a Federal question (our brief, pp. 24, 25).

16th. They claim on page 24 that as no writ of error lay from the first appeal, they should be allowed to raise the Federal question on the second trial. We do not dispute this, except to the extent that they have no right to raise it *for the first time* after the first appeal. That is a matter of practice and procedure, and discretionary with the trial court. If they had it already raised they could still insist on it, notwithstanding the decision of the Supreme Court, and indeed they would be bound to do this and not abandon or surrender it, as they have done here, if they had it already raised, as they claim.

See our brief, pp. 16, 17.

And our brief on the motion, pp. 12, 13.

17th. They claim on page 26 great things for their stricken-out fourth pleas, that they distinctly allege a compliance with the charter requirements, &c.

So they do, but the singular thing about these fourth pleas is that they nowhere set up *an irrepealable appropriation of taxes*, or raise any Federal question.

Our brief, pp. 41–43, 88–90.

18th. They say on page 27 that our claim that the judgment *nil dicit* is the equivalent of a default or consent judgment is, under the circumstances here, unwarranted. We think not. (See our brief, pp. 27–30, 33, and our brief on the motion to dismiss, pp. 22, 23.)

19th. They give as one reason on page 29 why we cannot claim that the tax collectors are necessary parties here that the record does not show that they were summoned. It is true that the question whether they are necessary parties is somewhat technical, and we care nothing about it and are entirely willing to leave it with the court, but we do not wish any decision based on that ground, because the rules of the Supreme Court require that the summonses, unless otherwise requested in writing, be left out of the transcript. (Our brief, p. 26.)

42 = 43

20th. On pages 34 and 49 and 50 they still insist that the legislature had the right to make this appropriation as a *donation*. We deny this.

Our brief, pp. 82, 83, 85, 86.

Our brief on motion to dismiss in No. 320, pp. 48–50, & 53 Miss. 240, 245

21st. On page 36 they claim that the exact point decided by the supreme court of Mississippi was that these exemptions were valid, the other reasoning being immaterial. This we strenuously deny, and appeal to the decisions themselves to the point that *the exact thing* decided was that the legislature could not grant irrepealable exemptions. The *exact point* in the Mississippi Mills case was the legislature

had actually partially repealed the exemption, and this repeal was *the thing* sustained. We here call attention to the fact that the legislature undoubtedly could repeal a void exemption as well as one only repealable, and this case did not necessarily involve the point whether the exemption was void or only repealable, because in either event *the repeal* and not the exemption would be *the valid thing*. The exact point decided and only point necessary to any of the decisions was that the exemption was repealable.

Mississippi Mills *vs.* Cook, 56 Miss., 54, 62.
Attala Co. *vs.* Kelley, 68 Miss., 44.
N. J. & C. R. R. Co. *vs.* Lambert, 70 Miss., &c., &c.

22d. On page 37 they ~~claim that~~ cite the case of Y. & M. V. R. R. Co. *vs.* Thomas, ~~goes so far as to overrule the prior decisions of the Mississippi supreme court, holding even that the exemption is repealable. What stuff is this on which our noble Cæsars feed~~? That case expressly states that the exemption was *conceded*, and the only point was when it commenced.

132 U. S., 188.

And both this court and all other courts hold that a point conceded is not the decision of the court, and is neither *res adjudicata* nor *stare decisis*.

Opinion of the court, Record, p. 664.
Keokuk *vs.* Mo., 152 U. S., 312, 316.
Our brief, p. 37.

Left out of their printed brief.

23d. They say on page 37 that "the reason why the court was urged below to overrule its prior decisions as to the validity of exemptions under the old constitution was to enable the recovery of taxes for the ten years prior to the consolidation." We cannot imagine why this insidious remark is flung into the arena, unless as a red rag, for it is extraneous and has nothing to do

with this case, which is for the current taxes falling due each year including and since the year 1892. The record and opinion of the court shows that we urged many points, some of which the court decided and some it declined to decide, and there is nothing in the record or *in pais* to show that we urged one point more strongly or persistently than another, unless it was the vital point of the effect of the consolidation, which had no application to back taxes. That point was urged from the beginning and continuously through every phase of the litigation.

24th. On page ~~38~~ 46 they argue the reference of the court to pages 118 *et sequitur* in the brief of opposite counsel. Our reply to this is our brief, pages 95, 96.

25th. On page ~~35~~ 38 they state that the legislature of 1880 repealed the requirement of *an assessment* in these 21st-section cases. If that is so, that repeal became a part of this 21st section, and when adopted, *in 1882*, as a part of the charter in controversy it was adopted *as it then stood*, with the requirement of *the assessment* repealed, and was an exemption pure and simple, for it is fundamental law that there can be no liability for taxes without an assessment of some kind; and counsel forgot to go further in this connection and state that the legislature of 1880 passed the Code of 1880, and that this code repealed all exemptions, whether of simple or appropriation form, showing conclusively that not only had the court in the Mississippi Mills case held that all exemptions were repealable, but that the legislature had actually acted on that construction and repealed them without cavil or complaint, there being thus both a legislative and judicial construction that these *appropriation* exemptions were repealable in force at the time of the grant of the charter in controversy in 1882. Many, indeed almost all the railroads taxed in the Code of 1880, had these twenty-

first-section appropriation charters, as will readily be seen by reference to § 608.

Code of 1880, sections 597–608.
N. J. & C. R. R. Co. *vs.* Lambert, 70 Miss.
Opinion of the court, Record, p. 671.

26th. Opposite counsel, on pages 35 and 36, attempt to illustrate their point that this appropriation is *taxation* by the case of R. R. Co. *vs.* McGuire, 20 Wall., 36, 44, ignoring the essential fact that that was an attempted subsequent legislative change of an irrepealable contract, which has no relevancy to the case at bar.

They also claim on page 48 that to hold that this appropriation is not as pure as Cæsar's wife and as unchangeable as the laws of the Medes and Persians would be to set traps for investors, forgetting that under both judicial and legislative construction it had been settled that such appropriations were repealable before this charter was granted, and ignoring the words of wisdom uttered by the courts that these catching phrases in charter exemptions are rather the words of the promoters than of the legislature.

Simmons *vs.* ——, 70 Miss. 485.

They also on pages 56–58 cite a lot of cases where a contract to furnish water, &c., is a valuable consideration for an exemption, utterly ignoring the fact that in such cases the contractor gets something real, substantial, and in hand, while in the case at bar the State does not get one single cent more than if it were an absolute and unconditional exemption.

27th. They also on pages 57 and 58 speak of the courts sustaining privilege and commutation taxes, but ignore the fact that where the legislature has *the power*, it is bound by section 20 of article 12 of the constitution of December 1, 1869, and section 112 of the constitution of 1890, to lay

them equally and uniformly, or, as the Mississippi supreme court puts it, in a decision rendered in 1877:

"It is well settled that if provisions of this character apply at all to privilege taxes imposed on business pursuits and professions, all that is necessary in levying them is that persons pursuing the same occupation shall be taxed to the same amount or in the same ratio."

Holberg *vs.* The Town of Macon, 55 Miss., 114, 115.

28th. On pages 60 to 63 they undertake to revive the old exploded doctrine that an exemption will pass into a consolidation *by presumption*. The last case among a host cited by them is the case of Tennessee *vs.* Whitworth, 117 U. S., the last of that line of unworthy ancestors which this court, commencing with the case of Pickard *vs.* Tennessee, 130 U. S., 637, has steadfastly and continuously refused to follow, saying in Phœnix Ins. Co. *vs.* Tennessee, 161 U. S., 178, that such a doctrine "is a complete overturning of the universal rule in regard to taxation." (See also opinion of court, Record, pp. 650 *et seq.*)

29th. On page 68 they assert that the *controlling* question is whether section 21 is in conflict with the constitution of 1890, and from that on to the end of the brief they devote to trying to show that there is no conflict.

In the first place, we deny that there is any such question, or, if there were, that it would be the *controlling* question, for both this court and the Mississippi supreme court have decided that it is not proper to decide constitutional questions unless necessary to arrive at a result; and there are other decisive issues.

Baker *vs.* Grice, 169 U. S., 291, 292.

Adams *vs.* Bank, 74 Miss., 316, 317.

And the earnest contention of opposite counsel, that the exemption was not cut off by the constitution of 1890, is untenable here. The Mississippi supreme court, as one

ground of decision, has decided that it was so cut off, and this is conclusive and binding on this court *if the power to cut off existed.* The only thing this court has jurisdiction of would be that conceding that the constitution of 1890 did prevent exemptions from passing into consolidations, does this impair the obligation of this particular contract? This court decides *cases* and has no jurisdiction to construe the laws or constitutions of a State. Its only prerogative is preventive—to shield, not to cure. The State court has exclusive jurisdiction to construe its own laws and constitutions, and the only duty of this court is to keep that construction from embracing a contract which it would impair. The State court has the exclusive right to say that the constitution of 1890 prevented exemptions from passing into consolidations, and this court has the veto power so far, and so far only, as to hold that that construction shall not be held to embrace this particular contract, because, and only because, it would impair its obligation. If it would not impair its obligation, you have no jurisdiction over the subject, and if it is repealable, its repeal could violate no contract, and, on the other hand, the State court has shown that this court in several late and well-considered opinions has held that the power to consolidate is a mere revocable license, and may be modified or repealed at any time before its exercise.

See opinion, Record, p. 638.

30th. As for their Appendix D, pages XV to XXI, giving a list of charters having appropriation and straight exemption forms, to show that the legislature recognized that there was an essential difference, we have only to say that this Appendix D is a substantial copy of the Appendix C, pages XIV to XVII in their brief on the motion to dismiss or affirm, with the exception that in the Appendix D are included some colleges, &c., previous to the year 1878, when the express provision of section 13, article 12, of the consti-

tution of December 1, 1869, only applies to corporations for *pecuniary profits*, and there is not a single railroad straight exemption in the list till the year 1878, when the Mississippi Mills case decided there was no essential difference. We have noticed this fully in—

Our brief, pp. 87, 88.

The foregoing is a mere answer to points attempted to be made in the brief of opposite counsel, and we do not wish the court to take it as a substitute for our full brief, which contains, as we believe, a full and complete analysis and argument of the case in all possible phases.

We ask the court to dismiss; and if that cannot be done, then to affirm.

F. A. CRITZ,

R. C. BECKETT,

Counsel for Defendant in Error.